

Rojas v. Superior Court: The Battle of Two Opposing Public Policies

by
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I Introduction

Back in 1979, when drafting the UNCITRAL Conciliation Rules,¹ Professor Pieter Sanders perceived with amazing foresight that a confidentiality rule in conciliation² could be too broad when it came to subsequent court proceedings, and therefore could not be absolute. By way of example, he suggested that an exception “could include ... a report about an examination of goods which no longer exist at the time of the [subsequent] proceedings.”³

Just such a case played itself out in the courts of California, culminating in July 2004, when the California Supreme Court rendered its opinion in *Rojas v. Superior Court for the State of California, County of Los Angeles*, 33 Cal. 4th 407 (2004). The Court overturned the ruling by the Court of Appeal for the Second District which had constructed an exception to mediation confidentiality in order to allow plaintiffs in a subsequent proceeding access to documents which the trial court had held (as a non-appellable finding of fact) to have been prepared for the sole purpose of mediation. In reversing that ruling, the Supreme Court held that confidentiality of mediation communications is absolute as it applies to evidence prepared for the sole and limited purpose of mediation (with the exception of evidence expressly specified by statute).

Just like the factual situation that Professor Sanders had predicted, *Rojas* was a case in which the plaintiffs in a subsequent court proceeding needed evidence used in the mediation of a prior proceeding that no longer existed at the time of the subsequent proceeding. However, it did not have the outcome he had advocated some 25 years earlier.

The *Rojas* case represents the dilemma that arises when two public policies collide. On the one hand is the established, strong public policy in the United States that requires the parties to disclose all relevant evidence. On the other hand is the newer but

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¹ The final (and current) version of the UNCITRAL Conciliation Rules (1980) can be found at <www.uncitral.org> (last visited February 28, 2005), by choosing a language (e.g. English), clicking on the tab on the left entitled “Adopted Texts”, and then on the hyperlink for “International Commercial Arbitration and Conciliation”. This leads to a page that lists, and hyperlinks to, all adopted texts in this area, including the “UNCITRAL Conciliation Rules (1980).” That hyperlink leads to the actual text of the Rules.

² The words “conciliation” and “mediation” are used herein interchangeably.

³ 10 YEARBOOK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE 89, 100, para. 75 (1979).

equally strong public policy supporting the confidentiality of conciliation so that the process can be as safe as possible.⁴ The policy of disclosure won in the court of appeal, the policy of mediation confidentiality won in the Supreme Court.

II The Underlying Action

In 1994, Julie Coffin and others had purchased three buildings on South Burlington Street in downtown Los Angeles, known as the Burlington Apartment Complex. In December 1996, Coffin filed a construction defect action⁵ against the developers, contractors and subcontractors (“Developers”), which included allegations that poor construction had led to water leakage, which resulted in the presence of toxic molds and other microbes on the property.⁶

The parties conducted a mediation and settled the underlying litigation in April 1999. Realizing that it was in both parties’ best interest to keep this evidence out of the hands of the tenants who might have been injured by the presence of toxic mold when living at the apartment complex⁷, they specifically agreed in their settlement agreement that the defect reports, repair reports and photographs for informational purpose were protected by Evidence Code Sections 1119⁸ and 1152 (an exclusionary rule relating to negotiations in compromise of litigation), and that such materials and the information contained therein would not be published or disclosed in any way without the prior consent of Coffin or by court order.⁹

III The Action by the Tenants

⁴ See Eric van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal*, 24 J. INT. ARB. 1, 48 (2004).

⁵ Coffin v. KSF Holdings (See Coffin’s Brief in Answer to Amicus Brief by Southern California Mediation Association, p. 2).

⁶ 102 Cal. App. 4th 1062, 1067 (2002)

⁷ See Max Factor III, *The Trouble with Foxgate and Rojas: When should Public Policy Interests Require that Mediation Confidentiality in California be Subject to Certain Common Sense Exceptions?*, <<http://mediate.com/articles/factorm1.cfm>> (last visited February 21, 2005).

⁸ Section 1119 of the California Evidence Code provides in pertinent part:

1119. *Written or oral communications during mediation process; admissibility.*

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any ... civil action

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any ...civil action

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

⁹ In April, 1997, Coffin had prepared a preliminary defect list identifying structural defects and mold infestation. In April 1998, she began air testing. In late 1998, one of the buildings at the complex was closed for abatement, including demolition and replacement of drywall and ceilings, application of anti-microbial agents, and plumbing repairs. The evidence at issue had first been introduced almost two years earlier, in 1998. 33 Cal. 4th 407, at 412 (2004).

Four months later, in August 1999, Rojas and almost 200 other tenants (“Rojas”) of the building complex (many of whom were children) commenced their action against Coffin and some of the contractors, alleging that the tenants did not become aware of the building defects until April 1999 (when the remedial work was started), and that Coffin and the Developers conspired to conceal the defects and microbe infestation from them.

After the trial court had denied an earlier, broader motion for production of documents, in March 2002, Rojas filed a second motion to compel production of photographs and video recordings of the project, including photographs provided in the underlying action as part of compilations, as well as raw data regarding air samplings for mold spores.

Rojas argued that the changed condition of the premises due to the remediation, and their ensuing inability to replicate the raw data and images recorded in the photographs, constituted good cause for the production of the materials sought. They pointed out that mold spore analyses did not constitute, without more, expert opinion; that photographs did not contain attorney opinion, impression or analysis; and that the court’s prior order mandated disclosure.

Coffin, on the other hand, argued that the photographs were “advocacy” because they showed impressions, and have arrows pointing out significant features. They weren’t just a mere group of photographs but constituted a report of their experts. And because a photograph was “worth a thousand words” they were more than just raw evidence. The photographs were taken for the purpose of mediation. Finally, particular photographs were taken because they were meant to depict a defect.

At the hearing, the trial court indicated it was troubled by applying the mediation privilege¹⁰ to raw evidence. Specifically, the court stated that the photographs troubled him because they were just fixed representations of the state of a particular place at a particular time, and if there was really no other way for the plaintiff to get it, the mediation privilege was not meant as a device or subterfuge to block evidence. The court pointed out that you can’t just put a piece of evidence in a mediation and make it disappear. Nonetheless, the court felt bound by the statutory language and ruled that the materials were absolutely protected from discovery, despite Rojas’ showing of necessity.

IV Rojas before the Court of Appeal

On appeal, Rojas argued that the mediation confidentiality provisions of Evidence Code sections 1115 *et seq.* do not shield physical evidence (such as photographs and raw test data) from discovery because such materials are purely evidentiary in nature (“non-

¹⁰ Although courts often refer to the evidentiary rule regarding mediation confidentiality as a privilege, technically, CA Evidence Code Section 1115 *et seq.* does not create a privilege in the true sense of the word, such as the mediation privilege created by the Uniform Mediation Act. See Van Ginkel, *supra* note 2, at 41-43.

derivative”), and that such evidence is therefore “clearly otherwise admissible,” pursuant to Section 1120¹¹.

Coffin argued that the statutory language of section 1119 was plain and there was no reason to read the doctrine of work-product protection¹² into the statute in order to determine the scope of the mediation privilege, which should be absolute. Coffin pointed out (correctly) that the lower court had made a *factual* finding that the materials were prepared for purposes of mediation, and the appeals court could not overturn that finding, as it was supported by substantial evidence.¹³

Construing the relevant sections of the Evidence Code that incorporate California’s mediation statute, the court of appeal concluded that the language of sections 1119 and 1120 is clear and unambiguous and that the plain language of the statute’s privilege from disclosure does not apply to all “evidence”.¹⁴ Rather, these sections “are meant to protect the substance of mediation, i.e., the negotiations, communications, admissions and discussions designed to reach a resolution of the dispute at hand.” What is unprotected is “evidence” which is “otherwise” admissible, or “subject to discovery outside of mediation”. “Otherwise admissible” evidence, according to the court of appeal, is relevant evidence that is otherwise not covered by the mediation privilege and not subject to exclusion under some other rule or privilege set forth in the Evidence Code. In other words, the court of appeal interpreted sections 1119 and 1120 to provide that “mediation confidentiality is meant to protect the substance of the negotiations and communications in furtherance of the mediation, not the factual basis of those negotiations.”¹⁵

¹¹ Section 1120 of the California Evidence Code provides in its entirety as follows:

1120. *Evidence otherwise admissible.*

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

¹² The Court of Appeal drew an analogy between its interpretation of Sections 1119 and 1120 and the work product doctrine in California. For purposes of this article, details of the complexities of the work product doctrine have been omitted. Generally, under the work product doctrine an attorney’s opinions, impressions, conclusions and theories receive absolute protection, but materials that contain a mixture of attorney’s opinions and more factual information are conditionally protected matter that may be disclosed upon a showing of necessity (e.g., where witnesses are no longer available). For a more detailed discussion, see Stan Roden, *Mediation Confidentiality ... It Depends*, <www.sbcadre.org/articles/0033.htm> (last visited February 27, 2005).

¹³ Clearly, if the trial court had found as a matter of fact that the materials had been prepared for litigation, and that they would (likely) also have been used at trial had the case not settled by mediation, the court of appeal would not have been compelled to construe an exception to the rule of Section 1119, which the Supreme Court found to be an impermissible judicial construct of a clear statutory provision.

¹⁴ Evidence Code Section 140 defines “evidence” as “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.” Section 140 thus covers both oral statements, written statements, and physical evidence. 102 Cal. App. 4th at 1075.

¹⁵ 102 Cal. App. 4th at 1076.

The court of appeal rejected Coffin’s reading of sections 1119 and 1120 that all materials introduced at the mediation, or prepared for the mediation, *including those of a purely evidentiary nature*, are encompassed within the scope of the privilege because they were “prepared for the purpose of, in the course of, or pursuant to,” the mediation. “Such a reading would render section 1120 complete surplusage and foster the evils it is designed to prevent: namely, using mediation as a shield for otherwise admissible evidence.”¹⁶

The court of appeal further found that the mediation privilege is co-extensive with the work product doctrine,¹⁷ as its framework of discoverable materials closely mirrors the express statutory privilege exception of section 1120, which applies to “evidence otherwise admissible” or items “subject to discovery outside of a mediation”. Derivative materials, however, the court continued, are discoverable only upon a showing of good cause, which requires a determination of the need for the materials balanced against the benefit to the mediation privilege obtained by protecting those materials from disclosure.

Applying the above outlined framework to the case, the court of appeal found that non-derivative material such as raw test data, photographs, and witness statements, are not protected by section 1119. To the extent any of the materials sought are part of a “compilation”, it must be produced if it can be reasonably detached from the compilation.

Finally, the court of appeal noted that Rojas had no other means of obtaining this information due to the fact they had not been joined in the prior lawsuit and because the remediation efforts undertaken by Coffin and the Developers had eliminated most, if not all, of the relevant evidence. Therefore, the court concluded that it may be appropriate in certain instances that Rojas be given amalgamated materials if such materials cannot easily be broken into their protected and non-protected components. Such a determination would have to be made by the trial court.

V *The Supreme Court’s decision*

The Supreme Court granted review on January 15, 2003¹⁸; the Court rendered its opinion that confirmed “absolute confidentiality” on July 12, 2004. Reversing the court of appeal’s decision (which, as noted above, had argued that a construction such as advocated by Coffin and now proposed by the Supreme Court would render Section 1120 “surplusage”¹⁹), Judge Ming Chin, delivering the opinion for a unanimous Supreme Court, noted that the court of appeal’s construction of Section 1119(a) would mean that Section 1119(b) would serve no purpose²⁰ and would render that section “essentially

¹⁶ 102 Cal. App. 4th 1062, 1076 (2002).

¹⁷ See *supra* note 12.

¹⁸ After the Supreme Court granted review of the Court of Appeal’s decision, the parties settled their case, but without filing a motion to dismiss the review. Also, discovery of the materials in question remained at issue in certain cross-claims that had not settled. 33 Cal. 4th 407, at 415, n.3 (2004).

¹⁹ See *supra* note 16, and accompanying text.

²⁰ *Id.*, at 418.

useless”.²¹ In addition, it found that the court of appeal’s holding was inconsistent both with the plain meaning of Section 1119²² and the legislative history of Sections 1119 and 1120.²³

Quoting liberally from its earlier decision in *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* 26 Cal. 4th 1 (2001),²⁴ the Supreme Court emphasized that “‘confidentiality is essential to effective mediation’ because it ‘promote[s] a candid and informal exchange regarding events in the past This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.’”²⁵

The Supreme Court recalled that in *Foxgate*, it had

“stated that ‘[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme ... unqualifiedly bars disclosure of’ specified communications and writings associated with a mediation ‘absent an *express statutory*

²¹ Ibid.

²² Id., at 416.

²³ Id., at 418.

²⁴ *Foxgate Homeowners' Association v. Bramalea California Inc.*, 26 Cal. 4th 1 (2001) (There are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator’s reports. While a party may do so, a mediator may not report to the court about the conduct of participants in a mediation session.)

²⁵ Id., at 415-416, quoting *Foxgate*, 26 Cal. 4th 1, 14. The only California case upholding admission, over objection, of statements made during mediation in which no statutory exception to confidentiality applied, was *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (1998), which the Supreme Court distinguished in *Foxgate*, 26 Cal. 4th at 15 (along with the *Olam v. Congress Mortgage* case mentioned *infra*, note 40). In *Rinaker*, the Court of Appeal held that, although a delinquency proceeding is a civil action within the meaning of Section 1119 and the confidentiality provisions were applicable, that statutory right must yield to a minor’s due process rights to put on a defense and confront, cross-examine, and impeach the victim witness with his prior inconsistent statements. To maintain confidentiality to the extent possible, however, the Court of Appeal stated that the juvenile court judge should first have held an in camera hearing to weigh the minors’ claim of need to question the mediator, against the statutory privilege to determine if the mediator’s testimony was sufficiently probative to be necessary. (*Rinaker*, *supra*, 62 Cal. 4th at 169-170.) The *Foxgate* Court stated that *Rinaker* was consistent with its past recognition and that of the United States Supreme Court that due process entitles juveniles to some of the basic constitutional rights accorded adults, including the right to confrontation and cross-examination. In *Foxgate*, however, plaintiffs had no comparable supervening due-process-based right to use evidence of statements and events at the mediation session. (*Foxgate*, 26 Cal. 4th 1, 15) It is surprising that the *Rinaker* argument was not used in *Rojas*., since it could be argued that there was a comparable supervening due-process-based need to use evidence presented at the mediation session.

In an unpublished opinion of the Court of Appeal for the First Appellate District, the trial court denied a motion seeking disclosure of statements made during mediation, which were sought to substantiate allegations of attorney malpractice. Following *Rojas*, the Court of Appeal found there was no applicable exception to the confidentiality privilege safeguarding mediation sessions that would permit disclosure, and declined to create one. *Malcolm v. Malcolm*, 2004 Cal. App. Unpub. LEXIS 10675 (1st Dis. 2004). As Jeff Kichaven suggested, the solution for overcoming this bar is to bring such a case as a disciplinary proceeding before the State Bar, which pursuant to Business and Professions Code Section 6090.6, “shall have access, on an ex parte basis, to all nonpublic court records relevant to the competence or performance of its members, provided that these records shall remain confidential.” See Jeff Kichaven, *Absolute Confidentiality—Is It Wise?*, <<http://www.irmi.com/Expert/Articles/2004/Kichaven08.aspx>> (last visited March 2, 2005).

exception.’ We also found that the “judicially crafted exception” to *section 1119* there at issue was ‘not necessary either to carry out the legislative intent or to avoid an absurd result.’ We reach the same conclusion here; as Judge Mohr observed, ‘the mediation privilege is an important one, and if courts start dispensing with it by using the ... test [governing the work-product privilege], ... you may have people less willing to mediate.’²⁶

On the one hand, the Court held that “writings” that fall within Section 1119(b) are completely confidential, unless one of the statutory exceptions to Section 1119 apply, but on the other hand affirmed that material objects as used in Section 140 are not protected by the mediation confidentiality provisions of Section 1119. The Court stated:

“[U]nder section 1119, because both photographs and written witness statements qualify as ‘writing[s], as defined in [s]ection 250,’ if they are ‘prepared for the purpose of, in the course of, or pursuant to, a mediation,’ then they are not ‘admissible or subject to discovery, and [their] disclosure...shall not be compelled.’ The Court of Appeal also held that ‘raw test data’ are never ‘protected by section 1119.’ Insofar as it was referring to actual physical samples collected at the apartment complex – either from the air or from destructive testing -- the Court of Appeal was correct; such physical objects are not ‘writing[s], as defined in [s]ection 250.’ (Sec. 1119, subd. (b).)”²⁷

VII *The Friends of the Court*

In a footnote, the Court noted that

“[the fact that] witness statements ‘prepared for the purpose of, in the course of, or pursuant to, a mediation’ are protected from discovery under section 1119 does not mean that *the facts* set forth in those statements are so protected. Under section 1120, subdivision (a), because facts known to percipient witnesses constitute “[e]vidence otherwise admissible or subject to discovery outside of a mediation,” those facts do not “become inadmissible or protected from disclosure solely by reason of [their] introduction or use in a mediation” through witness statements prepared for the purpose of, in the course of, or pursuant to, the mediation. Otherwise, contrary to the Legislature’s intent, parties could use mediation “as a pretext to shield materials from disclosure.”²⁸

The California Supreme Court noted that its interpretation of California Evidence Code Section 1120 is consistent with the interpretation of Rule 508 of the Federal Rules of Evidence. Rule 508 provides in relevant part: “Evidence of conduct or statements made in compromise negotiations is ... not admissible. This rule does not require the

²⁶ 33 Cal. 4th at 424. [*emphasis in original*]

²⁷ Id. at 416. Section 250 defines the word “writing” as follows:

250. “Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”

²⁸ 33 Cal. 4th at 423, n.8. [*emphasis in original*]

exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."

"As construed by the federal courts, the latter sentence "prevent[s] one from being able to 'immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.' [Citation.] [It] does not [apply] where the document, or statement, would not have existed but for the negotiations, hence the negotiations are not being used as a device to thwart discovery by making existing documents unreachable." (*Ramada Dev. Co. v. Rauch* (5th Cir. 1981) 644 F.2d 1097, 1107)"²⁹

This footnote would seem to touch on the core of the argument *in favor of* the judicially crafted exception to the mediation privilege such as proposed by the Court of Appeal, which tried to prevent the abuse of the mediation process that could occur by simply declaring certain evidence to have been prepared for the purpose of mediation and therefore excluded from evidence in subsequent proceedings.

The amicus curiae brief which the Southern California Mediation Association ("SCMA") submitted in support of Rojas pointed out that under the interpretation of Sections 1119 and 1120 proposed by Coffin (and adopted by the California Supreme Court) nothing would prevent parties to a mediation in a litigated case to declare certain writings to be "prepared for mediation" *after the fact*, i.e. at a time that the parties know they have a settlement, so that those writings can be excluded from subsequent proceedings.³⁰

This is actually *not* what happened in the underlying case, *Coffin v. KSF Holdings*, as the parties marked the writings at issue with the words "mediation privileged" prior to the actual commencement of the mediation proceedings.³¹ But such marking would not appear to preclude the use of such writings in a trial in the *Coffin v. KSF Holding* case should the mediation not have resulted in a settlement.

It was clearly in both parties' interests to attempt to block access to this type of evidence for tenants who would (and did) sue both these parties for injuries incurred as a result of the toxic mold. Considering the absence of any prohibition of future use at trial by the ones who mark documents as "mediation privileged" for that purpose, these

²⁹ 33 Cal. 4th 407, 417 n.5.

³⁰ Amicus Curiae Brief of Southern California Mediation Association in Support of Petitioners ("SCMA Amicus Brief"), p. 9. Both Max Factor III, *supra* note 7, and the SCMA Amicus Brief (at pp. 3-4, 9) seem to suggest that the parties in the first action, *Coffin v. KSF Holdings*, agreed *after the fact* (i.e. after their production in the mediation proceedings) that the documents used in the mediation should be treated as "prepared for mediation". Coffin and the Developers contended, however, that after the trial court ordered the parties in *Coffin v. KSF Holdings* to participate in mediation and to share the reports of their non-designated expert consultants, the participants marked their reports, which contained expert photographs and analyses, with the words "mediation privileged". Brief in Answer to Amicus Brief by Southern California Mediation Association, p. 2-3. The troubling fact remains that the Supreme Court's construction of Section 1119 does not distinguish between writings marked before their introduction or so marked towards the end of the mediation proceedings.

³¹ Brief in Answer to Amicus Brief by Southern California Mediation Association, p. 2-3. See also *supra* note 30.

markings are really irrelevant when it comes right down to it, - other than for the purpose of excluding the documents from any subsequent proceedings brought by one or more third parties against Coffin and the Developers. Irrespective of the purpose of these markings, there can be little doubt that Coffin and the Developers included the provision in their settlement agreement with respect to the inadmissibility of these documents in subsequent proceedings without prior approval of Coffin or a court, for the express purpose of trying to prevent their discovery in any subsequent proceedings brought by tenants.

Given these considerations, the question has to be asked whether marking a document with the words “mediation privileged” ought to conclusively establish that such documents are *in fact* “prepared for the purpose of” a mediation, even if such marking is self-serving and would not prevent the party so marking the document from using it as evidence in that party’s subsequent trial should the case not settle in mediation.

It illustrates how difficult it must have been for Judge Mohr at the trial court level to make a finding of fact that the documents, photographs and other evidence at issue (which, it may be recalled, included factual, non-derivative materials), were “prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation” within the meaning of Section 1119(b) of the California Evidence Code, *and* did not come within the exception of “[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation” within the meaning of Section 1120(a).³² Obviously, the trial court was not in a position to speculate whether or not the writings were marked “mediation privileged” in order to prevent them from being admitted in subsequent proceedings.

It is therefore somewhat surprising that another organization of mediators, the California Dispute Resolution Council (CDRC), which submitted an amicus curiae brief in support of Coffin, argued that “whether a writing was created for a mediation is nothing more than a fact issue that a trial court is well-prepared to address.”³³ If, as it should, the true motivation of a party that classifies a document as having been prepared for the purpose of mediation plays a role in this equation, the trial court would appear to have an almost impossible task.

Although the SCMA and the CDRC found themselves at opposite ends of the argument, each claimed that if the Supreme Court would not adopt its position, it would mean the end of mediation as we know it:

On the one hand, the SCMA argued that “affording absolute confidentiality to all evidence belatedly claimed to have been “prepared for mediation” would destroy the integrity of mediation and the integrity of litigation as well.”³⁴ Quoting presiding justice Lillie’s opinion for the court of appeal, the SCMA argued that it would be “disastrous” to

³² 102 Cal. App. 4th at 1072.

³³ Brief of the California Dispute Resolution Council Amicus Curiae in Support of Real Parties in Interest (“CDRC Amicus Brief”), p.7.

³⁴ SCMA Amicus Brief, p. 2.

construe Section 1119 in that way, for “(1) the courts which rely on mediation to help manage crowded dockets, (2) careful lawyers who use mediation appropriately to serve the interests of their clients, and achieve settlements where reasonably possible, and (3) most importantly, the public, which relies on the courts to administer justice.”³⁵

On the other hand, the CDRC argued that “the candor that is induced by confidentiality is vital to the continuing success of mediation.”³⁶ Urging the Supreme Court to reject the challenge to mediation confidentiality just as it did in *Foxgate*,³⁷ it suggested that for “a trial court the pivotal inquiry commanded by Evidence Code Sections 1119 and 1120(a) [is whether] a writing pre-existed the mediation or [whether] it was prepared for the mediation.”³⁸ The problem with framing the issue in these terms is that it overlooks the possibility that even if a document was prepared “for the specific purpose of preparing [a party’s] presentation for the mediation,”³⁹ the document may not be for the *exclusive* use in mediation if later on that same party decides to use it as evidence in the trial that would follow if the case failed to settle at mediation.

Clearly, there is no easy solution to the dilemma posed by the two conflicting public policy issues, one in favor of access to evidence in litigation, the other in favor of confidentiality of written communications prepared for or used in mediation, at least not when one considers the current wording of Sections 1119(b) and 1120(a) of the California Evidence Code.

A solution advocated by the SCMA is that the legislature amends Section 1119(b) to limit the mediation privilege to such writings as are marked “prepared for mediation” *prior* to its introduction in the mediation, and on the condition that such writings are then inadmissible if offered by or against such party at trial in the event the mediation fails to lead to a settlement. This solution appears to present three problems: first, penalizing the parties in this way may in certain circumstances put an undesirable limitation on the freedom of either party when a confidential document has been introduced in mediation which the introducing party may need in trial if the case does not settle in mediation. Second, given the confidentiality of mediation, there may be problems of proof if at trial a document is introduced as evidence (but without the marking) that in some part is the same as the document that is supposed to be inadmissible. Furthermore, it does not seem to resolve the dilemma as to what to do if a third party needs access to such writings.

It would appear that the only practical solution may be to amend the statute in a way that, *in addition to* the rule proposed by the SCMA that the mediation privilege attaches only to those documents that have been marked “prepared for mediation” prior to their introduction in mediation, expressly authorizes the trial court to weigh the interests of the two conflicting public policies in a subsequent trial, be it between the

³⁵ Id., p.3.

³⁶ CDRC Amicus Brief, p.2.

³⁷ Id., p.3.

³⁸ Id., p.6.

³⁹ See the answer to a question of the trial court by Lisa Ehrlich, one of Ms. Coffin’s attorneys in *Coffin v. KSF Holdings* quoted in Brief in Answer to Amicus Brief by Southern California Mediation Association, p. 17.

same parties or involving one or more third parties.⁴⁰ Armed with such discretionary authority, the trial court would be able to admit such a document in spite of the SCMA-proposed rule of its subsequent inadmissibility (where applicable), if the interest of access to evidence in litigation outweighs the interest of keeping a particular writing confidential because it had been prepared for mediation, - for example because there is no other way for a party to obtain such the evidence since it no longer exists.

It seems that Professor Pieter Sanders was right all along. Absolute mediation confidentiality does not provide a satisfactory solution, even though that now appears to be the doctrine of the California Supreme Court. The solution must be found in an appropriate mechanism that allows the two conflicting public policies to live in harmony. It is submitted that this goal is hard to achieve by artful drafting of “static” statutory exceptions to the mediation confidentiality rule.⁴¹ Discretionary authority of a trial court that can weigh the particular interests involved on a case-by-case basis, in combination with a statutory rule which in principle limits subsequent use by or against a party which designates a writing as prepared for mediation prior to its introduction appears to be a workable solution.

⁴⁰ A similar weighing process was applied in *Rinaker*, *supra* note 25 (weighing the public policy of mediation confidentiality against that of a juvenile’s due process right to put on a defense and confront, cross-examine, and impeach the victim witness with his prior inconsistent statements evidence), and in *Olam v. Congress Mortgage Company*, 68 F. Supp. 2d 1110 (N.D.Cal. 1999) (weighing the public policy of mediation confidentiality against that of establishing the competence of one of the parties to enter into a settlement agreement, whereby magistrate judge decided to allow the mediator’s testimony because it was the most reliable and probative evidence and *there was no likely alternative source*).

⁴¹ That is not to say that statutory exceptions don’t work in other settings. See, e.g. Section 6(a) of the Uniform Mediation Act, www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm (last visited March 2, 2005).